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2019 FEB 21 PM COURT OF COMMON PLEAS CLERMONT COUNTY, OHIO

BARBARA A. WIEDENBEIN
CLERK OF COMMON PLEAS
CLERMONT COUNTY, OH

CINCINNATI NATURE CENTER,
ET. AL.

: CASE NO. 2018 CVH 01675

Plaintiffs

: Judge McBride

vs.

:

UNION TOWNSHIP, CLERMONT
COUNTY, OHIO, ET. AL.

: DECISION/ENTRY

Defendants

:

:

Strauss Troy, Co., LPA, Matthew W. Fellerhoff, and Emily T. Supinger, counsel for the plaintiffs Cincinnati Nature Center, Committee to Protect Avey's Way, Maria Jo Keri, and Anne Robinson, 150 East Fourth Street, 4th Floor, Cincinnati, Ohio 45202.

Strauss Troy, Co., LPA, Richard S. Wayne and Jeffrey A. Levine, counsel for Strauss Troy, Co., LPA, Matthew W. Fellerhoff, and Emily T. Supinger, 150 East Fourth Street, 4th Floor, Cincinnati, Ohio 45202.

Flagel & Papakirk, LLC, James Papakirk and Hallie S. Borellis, counsel for the defendant Angeleke Sansalone, 50 East Business Way, Suite 410, Cincinnati, Ohio 45241.

Schroeder, Maundrell, Barbieri & Powers, Lawrence E. Barbieri and Katherine L. Barbieri, counsel for the defendants Union Township, Clermont County, Ohio and the Board of Trustees of Union Township.

This cause is before the court for consideration of the defendant Angeleke Tsiribas Sansalone's motion to disqualify Strauss Troy Co., LPA ("Strauss Troy"), and the individual lawyers from Strauss Troy involved in this case, as counsel for the plaintiffs Cincinnati Nature Center, Committee to Protect Avey's Way, Maria Jo Keri, and Anne Robinson.

Upon consideration of the motion, the record of the proceedings, the evidence presented for the court's consideration, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE AND PROCEDURAL BACKGROUND

I. HISTORY OF THIS CASE

In order to properly contextualize and understand the import of Angeleke Tsiribas Sansalone's current disqualification motion, the court must provide some procedural and factual information concerning the matters involved in this case. The plaintiffs Cincinnati Nature Center, Committee to Protect Avey's Way, Maria Jo Keri, and Anne Robinson filed suit against the defendants Union Township, Clermont County, Ohio, Board of Trustees of Union Township (hereinafter referred to as "Board of Trustees"), and Sansalone on November 27, 2018.

The complaint concerns the proposed development of real property consisting of approximately 271 acres located on the east and west sides of Rumpke Road and north of Deervalley Drive and Surrey Trail in Union Township, Clermont County, Ohio ("the Property"). The crux of the plaintiffs' claims is that a proposed development of the Property contravenes Union Township's Zoning Resolution, as well as a recorded Agreed Judgment Entry and Consent Decree ("Consent Decree"), which the United States District Court for the Southern District of Ohio approved in 2000.

The Property was initially owned by the Coolock Corporation, before being transferred to the Sisters of Mercy of Clermont in 1997. In 1998, it was transferred to Anthony M. Sansalone, Trustee, and then to its current owner, the defendant Angeleke Tsiribas Sansalone in 2009. Anthony Sansalone is married to Angeleke Sansalone. The plaintiff Cincinnati Nature Center owns real property known as Rowe Woods, which is adjacent to and borders the Property.

In 1990, John Sansalone, a developer and Anthony Sansalone's father, sought to develop the Property. However, the Zoning Commission for Union Township recommended against the proposed development, and the Board of Trustees rejected the proposed amendment. This led the Property owners to bring a lawsuit against Union Township challenging the denial in state court. Both the trial and appellate courts affirmed Union Township's denial. The Property owners then again presented another development plan, which was likewise rejected and appealed. The trial and appellate courts likewise affirmed Union Township's denial.

The Consent Decree came about in 1998 when Anthony M. Sansalone and Rumpke Road Development Corporation filed a complaint for declaratory judgment and money damages in the United States District Court for the Southern District of Ohio. The suit challenged the zoning designation of the Property and sought to develop the Property as a planned single family housing residential community. The parties to the 1998 case settled their dispute, and the court approved the Consent Decree. The plaintiffs contend that the Consent Decree granted the Property's owner a minor variance of the applicable zoning provisions regarding lot size, width, and setbacks.

In 2014, Fischer Homes proposed a development of the Property. Upon meeting opposition from the public, the plan was abandoned. In 2017, Fischer Homes again proposed a development of the Property, which would include 1,445 units, which would include 875 multi-family units, 400 single family units, and 250 units that may either be single family or multi-family. On October 25, 2018, the Board of Trustees passed Resolution 2018-52, approving the proposed development.

The plaintiffs posit that the defendants are effectively and illegally rezoning the Property in contravention of the requirements in R.C. Chapter 519 and by ignoring law that prohibits a township from zoning property in violation of Union Township's adopted land use plan.

The plaintiffs' November 27, 2018 complaint includes multiple counts for declaratory judgment, as well as claims for violations of 42 U.S.C. § 1983, in violation of the 1st, 5th, and 14th Amendments, and a claim for lending of credit and use of eminent domain for the benefit of a private developer. The plaintiffs seek a declaratory judgment declaring that the Resolution is in violation of the current zoning requirements affecting the Property, that the Board of Trustees improperly modified the Consent Decree to allow for the proposed development, and that the Board of Trustees improperly changed the zoning designation of the Property by failing to follow the procedures for notice and hearings set forth in R.C. 519.12.

On February 4, 2019, Sansalone filed a motion to disqualify Strauss Troy as counsel for the plaintiffs. On February 13th, the plaintiffs filed a memorandum in opposition. Sansalone filed supplemental affidavits the same day. On February 14th, the plaintiffs likewise filed additional exhibits in opposition to Sansalone's motion. That same

day the court heard oral argument on the motion, and at the conclusion of the arguments of counsel, took the motion under advisement.

II. FINDINGS OF FACT REGARDING STRAUSS TROY'S REPRESENTATION

From 1995 until 2006, Anthony Sansalone and Angeleke Sansalone hired and worked with counsel at Strauss Troy. The legal work Strauss Troy provided the Sansalones related to personal and business matters, including real estate matters, estate planning matters, and tax planning. Throughout this eleven year period, Strauss Troy worked on multiple matters, and accumulated over \$1,000,000 in compensation from the Sansalones. Strauss Troy had received the Sansalones tax returns and partnership agreements.

Since 1993, Strauss Troy has represented the Cincinnati Nature Center. At the time of the litigation in the Southern District of Ohio concerning the Property in 1998, Rumpke Road Corporation and Anthony Sansalone were represented by another law firm Barrett & Weber. Counsel from Barrett & Webber contacted a Strauss Troy attorney, Thomas Rink, who represented the Cincinnati Nature Center, in April 1998 about the lawsuit to inquire whether the Cincinnati Nature Center would participate in a mediation in order to protect its interest in the responsible development of the Property. At this time, the Cincinnati Nature Center's interests in the zoning of the Property were directly adverse to those of Rumpke Road Corporation and Anthony Sansalone. When the Consent Decree was issued in 2000, Rumpke Road Corporation and Anthony Sansalone were still represented by Barrett & Weber.

Several Strauss Troy attorneys worked with the Sansalones between 1995 and 2006, including Charles Ashdown, Philomena Ashdown, Anthony Barlow, Marilyn Maag, and Michael Ruth. In 2009, Maag left Strauss Troy to work at Porter Wright. None of these attorneys are presently working on the instant litigation on behalf of the Cincinnati Nature Center.

Matthew Fellerhoff and Emily Supinger, both Strauss Troy attorneys, now represent Cincinnati Nature Center and the other plaintiffs. Fellerhoff joined the firm in 2012 and Supinger in 2013. Fellerhoff avers that he has never discussed this litigation with any of the above attorneys, except to conduct a conflict check with Barlow.

Both parties provided conflicting affidavits and evidence concerning whether Strauss Troy ever provided the Sansalones legal advice regarding the Property. Anthony Sansalone avers that he and his wife confided in Strauss Troy concerning several matters related to the Property, including their intentions on its development and use as well as attendant confidential strategies. He specifically states that he discussed the Property with Barlow and Maag multiple times, including the possibilities of developing or donating it, and the value and legal implications associated with each possibility. These possibilities included donating the property to the Cincinnati Nature Center. Maag also avers that she had confidential discussions relating to the Property with the Sansalones, including its value, the fact that it was near the Cincinnati Nature Center, and the Sansalones' plans for the Property. According to Anthony Sansalone, Barlow stated that if he wanted to donate the Property to the Cincinnati Nature Center, then he should speak with Rink, who represented it. Sansalone also claims that he consulted with Barlow and

Maag about the effect of the Consent Decree on the donation or development of the Property.

On the other hand, Charles Ashdown, Philomena Ashdown, Barlow, and Ruh all aver that their work for the Sansalones never involved plans to develop the Property, and that they never discussed the Sansalones' objectives, intentions, or strategies concerning the development of the Property.

Additionally, after this lawsuit was filed, the Sansalones contacted Strauss Troy regarding a possible conflict of interest. Since that time, the Sansalones or their counsel have received all remaining records that Strauss Troy retained related to its representation of the Sansalones, which included more than 18 boxes of documents. They have also received all billing records and timesheets. There is a catalogue that corresponds to the boxes and describes the contents. One box is noted to contain matters related to Rumpke Family Farm, another contains the Rumpke Road title, and a third notes the Cincinnati Nature Center. The Sansalones have not provided the court with the documents that were noted in the box catalogue for review to see if they contain information that would lead to a conflict.

As will be more fully explained in the following section, based on the conflicting evidence, the court ultimately finds that Strauss Troy's representation of the Sansalones did not include advice regarding development of the Property.

LEGAL ANALYSIS

The trial court maintains broad discretion to determine whether counsel should be disqualified from participating in ongoing litigation.¹ Disqualification of counsel is a "drastic measure which courts should hesitate to impose except when absolutely necessary[,] in large part because it deprives a client of the counsel of his choosing."² Accordingly, counsel should not be disqualified "solely upon an allegation of a conflict of interest; even where the requested disqualification is based upon ethical considerations, the moving party still must demonstrate that disqualification is necessary."³ Likewise, even if counsel's representation violates the Code of Professional Conduct, "counsel should not be disqualified unless the attorney's conduct poses a significant risk of tainting the proceedings."⁴

Determinations of whether to disqualify counsel are "fact specific."⁵ "Where a party has moved to disqualify counsel based on a conflict of interest, a trial court has a duty to

¹ *Creggin, Ltd. v. Crown Diversified Industries Corp.*, 113 Ohio App.3d 853, 858, 682 N.E.2d 692 (12th Dist. 1996), citing *Grubb v. Hollingsworth*, 69 Ohio App.3d 804, 806, 591 N.E.2d 1297 (12th Dist. 1990). See *In re Ross*, 154 Ohio App.3d 1, 2003-Ohio-4419, 796 N.E.2d 6, ¶ 12 (1st Dist.), citing *Royal Indemn. Co. v. J.P. Penney Co., Inc.*, 27 Ohio St.3d 31, 501 N.E.2d 617 (1986) (explaining that the court has the inherent power to oversee "the ethical conduct of the attorneys as well as the dismissal or disqualification of attorneys who cannot, or will not, comply with the Code of Professional Responsibility.").

² *Fifth Third Bank v. Q.W.V. Properties, L.L.C.*, 12th Dist. Butler No. CA2010-09-245, 2011-Ohio-4341, quoting *Litigation Mgt., Inc. v. Bourgeois*, 182 Ohio App.3d 742, 746, 2009-Ohio-2266, 915 N.E.2d 342 (8th Dist.).

³ (Emphasis original.) *Fifth Third Bank*, 2011-Ohio-4341 at ¶ 41, quoting *Creggin*, 113 Ohio App.3d at 858. See *Fried v. Arbaitis*, 61 N.E.3d 545, 2016-Ohio-934, ¶ 12 (8th Dist.), citing *Centimark Corp. v. Brown Sprinkler Service, Inc.*, 85 Ohio App.3d 485, 489, 620 N.E.2d 134 (11th Dist. 1993). ("The moving party bears the burden of demonstrating the need to disqualify counsel."); *Legal Aid Soc. of Cleveland v. W & D Partners I, L.L.C.*, 162 Ohio App.3d 682, 2005-Ohio-4130, 834 N.E.2d 850, ¶ 20 (8th Dist.), quoting *Centimark Corp.*, 85 Ohio App.3d at 489 (opining that "a violation of the Code of Professional Responsibility alone should not result in disqualification, unless such disqualification is found to be absolutely necessary.").

⁴ *Fifth Third Bank*, 2011-Ohio-4341 at ¶ 41, citing *Creggin*, 113 Ohio App.3d at 858.

⁵ *Campbell*, 2004-Ohio-6716 at ¶ 14. See *Phillips v. Haidet*, 119 Ohio App.3d 322, 324, 695 N.E.2d 292 (3d Dist. 1997) ("Thus, when making a decision [regarding disqualification of counsel], the court must rely upon a thorough consideration of the facts.").

investigate the conflict * * *.”⁶ The moving party bears the burden of proving that disqualifying counsel is necessary,⁷ and thus “must provide some evidence that a need for the disqualification exists.”⁸ As such, “[u]nsupported allegations are insufficient.”⁹

Sansalone argues that the court should review her motion using Prof.Cond.R. 1.7, which prohibits an attorney from representing a client if that representation is adverse or materially limits the representation of a *current client*. However, Prof.Cond.R. 1.9 sets forth an attorney’s duties to *former clients*, and therefore the court will review Prof.Cod.R. 1.9.¹⁰ Prof.Cond.R. 1.9 states:

“(a) Unless the former client gives *informed consent confirmed in writing*, a lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a *substantially related matter* in which that person’s interests are materially adverse to the interests of the former client.”¹¹

Prof.Cond.R. 1.10 imputes conflicts an individual lawyer may have under Prof.Cond.R. 1.9 to other lawyers associated at the same firm.¹²

⁶ *Ward v. Rippe*, 12th Dist. Clermont No. CA2016-10-067, 2017-Ohio-5505, ¶ 39, citing *155 N. High v. Cincinnati Ins. Co.*, 72 Ohio St.3d 423, 426 (1995).

⁷ *In re Ross*, 2003-Ohio-4419 at ¶ 13, citing *Hollis v. Hollis*, 124 Ohio App.3d 481, 706 N.E.2d 798 (8th Dist. 1997). See *Wynveen v. Corsaro*, 8th Dist. No. 105538, 2017-Ohio-9170, 106 N.E.3d 130, ¶ 18, citing *Lytle v. Matthew*, 8th Dist. Cuyahoga No. 104622, 2017-Ohio-1447, ¶ 13 (“The burden of proof rests with the party moving for disqualification.”).

⁸ *In re P.G.T.*, 7th Dist. Columbiana No. 14 CO 0034, 2016 WL 3258520, *3 (June 13, 2016). See *Campbell v. Independent Outlook, Inc.*, 10th Dist. Franklin No. 04AP-310, 2004-Ohio-6716, ¶ 11, citing *Hollis*, 124 Ohio App.3d at 481 (“As to the second prong of the *Dana* test, the moving party is required to show some evidence that the former representation substantially relates to the present adverse action.”); *Phillips*, 119 Ohio App.3d at 327 (“Second, the moving party must provide some evidence that a need for the disqualification exists.”).

⁹ *Hollis*, 124 Ohio App.3d at 485, citing *Morgan v. North Coast Cable Co.*, 63 Ohio St.3d 156, 586 N.E.2d 88 (1992). See *Phillips*, 119 Ohio App.3d at 327 (explaining that a mere allegation that allowing the representation presents the possibility of a breach of confidence or the appearance of impropriety is not enough.).

¹⁰ *Douglass v. Priddy*, 11th Dist. Geauga No. 2013-G-3172, 2014-Ohio-2881, ¶ 17.

¹¹ (Emphasis original.) Prof.Cond.R. 1.9(a).

¹² Prof.Cond.R. 1.10(a).

Comment Two to Prof.Cond.R. 1.9 clarifies the "scope of a 'matter'." A matter's scope "depends upon the facts of a particular situation or transaction. * * * [A] lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client."¹³

A "substantially related matter" is defined in Prof.Cond.R. 1.0(n) as "one that involves the same transaction or legal dispute or one in which there is a substantial risk that confidential factual information that would normally have been obtained in the prior representation of a client would materially advance the position of another client in a subsequent matter."¹⁴ In turn, Comment Three to Prof.Cond.R. 1.9 helpfully explains: "* * * Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related."¹⁵

"The past representation of a party does not in and of itself establish a conflict of interest."¹⁶ Instead, when an "attorney-client relationship is a former one, Ohio courts use the 'Dana test' when considering the disqualification of former counsel due to a conflict of interest."¹⁷ The *Dana* test was developed from *Dana Corporation v. Blue Cross & Blue*

¹³ Prof.Cond.R. 1.9, Comment 2.

¹⁴ Prof.Cond.R. 1.0(n).

¹⁵ Prof.Cond.R. 1.9, Comment 3.

¹⁶ *Stanley v. Bobeck*, 8th Dist. Cuyahoga No. 92630, 2009-Ohio-5696, ¶ 20, citing *Hollis*, 124 Ohio App.3d. at 484-485.

¹⁷ *Wynveen*, 2017-Ohio-9170 at ¶ 18, citing *Stanley*, 2009-Ohio-5696 at ¶ 13. See *Fried*, 2016-Ohio-934 at ¶ 12 (indicating that Ohio courts apply the *Dana* test to determine whether to disqualify counsel due to a conflict of interest); *Podor v. Hartow*, 8th Dist. Cuyahoga No. 106442, 2018-Ohio-4110, ¶ 25, citing *Wynveen*, 2017-Ohio-9170 at ¶ 18 ("The three-part Dana test is employed where a former client of counsel for the opposing party pursues disqualification of that counsel due to a conflict of interest.").

Shield Mutual of N. Ohio, 900 F.2d 882 (6th Cir. 1990). The three-part *Dana* test requires trial courts to determine whether: “(1) a past attorney-client relationship existed between the party seeking disqualification and the attorney it seeks to disqualify; (2) the subject matter of those relationships is substantially related; and (3) the attorney acquired confidential information from the party seeking disqualification.”¹⁸

As mentioned, under the second prong of the *Dana* test, the subject matter of the past and present attorney-client relationships must be “substantially related.” In addition to the definition of “substantially related matter,” described above in Prof.Cond.R. 1.0(n), courts applying the *Dana* test have also defined a substantial relationship as follows: “[T]o have a substantial relationship there must be a commonality of issues between the prior and present representations, and the factual contexts of the two representations must be similar or related.”¹⁹ There must be, in other words, a “clear connection” between the two cases.²⁰

In applying the *Dana* test to the instant case, the first prong is clearly satisfied, which examines whether a past attorney-client relationship existed. It is undisputed that Strauss Troy represented the Sansalones and their businesses from 1995 to 2006.

However, for several reasons the court finds that Sansalone has failed to satisfy her burden of proving the second prong, which examines whether the subject matter of Strauss Troy’s prior representation of the Sansalones is substantially related to the present case.

¹⁸ *Fried*, 2016-Ohio-934 at ¶ 12, citing *Centimark Corp.*, 85 Ohio App.3d at 487.

¹⁹ *Estate of Grilli*, 2008-Ohio-3126 at ¶ 62.

²⁰ *Campbell*, 2004-Ohio-6716 at ¶ 11. See *Phillips*, 119 Ohio App.3d at 327 (finding that there must be a “clear connection” between the two cases.”).

First, in resolving the conflicting affidavit testimony between Strauss Troy attorneys and the Sansalones, the court finds that the current Strauss Troy attorneys' version of their representation is more credible. Strauss Troy has represented the Cincinnati Nature Center since 1993. Indeed, Strauss Troy was an adversary to Anthony Sansalone from 1998 to 2000 in the litigation in the District Court for the Southern District of Ohio. At the time, Sansalone was represented by another firm, not Strauss Troy, in the federal litigation. The court is hard pressed to believe that the Sansalones would have consulted Strauss Troy concerning the Property's Development given its adversarial representation of the Cincinnati Nature Center at the same time. Likewise, the court finds it unlikely that Strauss Troy attorneys would have accepted confidential information from the Sansalones for the same reason.

Second, Sansalone claims that the catalogue of documents she received from Strauss Troy evidences the fact that her prior representation included legal counsel concerning the Property and Cincinnati Nature Center. However, if these documents in fact show a commonality of issues between Strauss Troy's representation and the case at bar, the court is at a loss as to why the Sansalones did not submit these documents as evidence for the court to review. It is, after all, Sansalone's burden to show that these matters are substantially related, and she controls the documents that could corroborate her and her husband's affidavit testimony. Their absence leads to the reasonable inference that the documents are not helpful to corroborating the Sansalones' testimony.

Third, even if Strauss Troy had received confidential information or provided legal counsel concerning the Property's development, any such occurrences were more than a decade ago. It is unclear when the Sansalones allege that they last sought advice or

provided confidential information concerning the Property's development during their relationship with Strauss Troy from 1995 until 2006. Even if the court assumes it was as late as 2006, that is thirteen years ago. As Comment Three to Prof.Cond.R. 1.9 explains: " * * * Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related."²¹ The present development proposal for the Property was made in 2017 by Fischer Homes. Even if the court found the Sansalones' affidavits credible, there is no persuasive evidence before the court showing how advice to the Sansalones from thirteen years prior concerning donating the Property to the Cincinnati Nature Center would be relevant and substantially related to the pending litigation before this court.

As explained, the court does not believe that Strauss Troy received confidential information related to the Property or the Cincinnati Nature Center from the Sansalones, nor does it believe its representation of the Sansalones involved the same. As such, the court cannot find the issues in the present litigation exhibit a substantial relationship to Strauss Troy's past representation. Strauss Troy's past representation concerned the Sansalone's personal and business matters, including real estate matters, estate planning matters, and tax planning. The present litigation concerns the actions of Union Township and the Board of Trustees in passing Resolution 2018-52, which allows for the Property's development under the 2017 Fischer proposal, in spite of the Consent Decree and Ohio law. Each count in the complaint centers on Resolution 2018-52's illegality and the illegality of the Board of Trustee's actions.

²¹ Prof.Cond.R. 1.9, Comment 3.

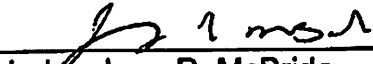
This is not a case about the Sansalones' other real estate, estate planning, and tax planning matters, which do not concern the Property. Accordingly, the court cannot find that there are a commonality of issues between the prior and present representations, nor can it find that the factual contexts of the two representations are similar or related.²² Because the second prong of the *Dana* test is unsatisfied, the court concludes that there is no need to disqualify Strauss Troy from representing the plaintiffs, including its client of 16 years, due to a conflict of interest with Sansalone.

CONCLUSION

For the foregoing reasons, the court finds that the defendant Angeleke Tsiribas Sansalone's motion to disqualify Strauss Troy as counsel for the plaintiffs is not well-taken and is hereby denied.

IT IS SO ORDERED.

DATED: 2-21-19

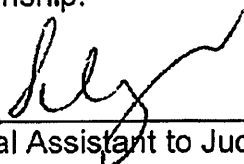


Judge Jerry R. McBride

²² See *Estate of Grilli*, 2008-Ohio-3126 at ¶ 62.

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the within Entry were sent on this 21st day of February 2019 to Matthew W. Fellerhoff, at mwfellerhoff@strausstroy.com, and Emily T. Supinger, at etsupinger@straustroy.com, Attorneys for the Plaintiffs; Richard S. Wayne, at rswayne@strausstroy.com, and Jeffrey A. Levine, at jalevine@strausstroy.com, counsel for Strauss Troy, Co., LPA, Matthew W. Fellerhoff, and Emily T. Supinger; to James Papakirk, at jpapakirk@fp-legal.com, and Hallie S. Borellis, counsel for the defendant Angeleke Sansalone, at hborellis@fp-legal.com; and to Lawrence Barbieri, at lbarbieri@smbplaw.com, and Katherine L. Barbieri, at kbarbieri@smbplaw.com, Attorneys for the Defendants Union Township, Clermont County, Ohio and the Board of Trustees of Union Township.



Judicial Assistant to Judge McBride